Supreme Court, U.S.
FILED
MAY 26 1995
CLERK

No. 94-1799

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GEORGE SILANO, by and on behalf of himself and
the high school students in
the Sag Harbor Union Free School District,

Petitioner,

v.

SAG HARBOR UNION FREE SCHOOL DISTRICT BOARD
OF EDUCATION, SUPERINTENDENT DR. THOMAS ROY,
individually and in his official capacity as Superintendent,
PATRICIA BRANDT, individually and in her official capacity
as President of the Board of Education, and
THOMAS HORN, JR., invididually and in his official
capacity as Vice President of the Board of Education,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can defendant school authorities be liable in damages under 42 U.S.C. §1983 to plaintiff school board member for criticizing his judgment and temporarily limiting his access within the high school building as a consequence of his circulating during a "guest lecture" a sexy celluloid depicting an unclothed female, and others, which prominently featured her breasts, to a co-educational tenth grade math class where there was no pedagogical point or purpose to the use of this particular visual aid?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The Lecture.

This case concerns actions taken by the Sag Harbor School Board and Superintendent Thomas Roy in connection with an incident that occurred on Thursday,

February 4, 1993. Petitioner George Silano, a member of the School Board and a self-styled film maker, was guest lecturing that day to a tenth grade co-educational math class. To illustrate the phenomenon known as "persistence of vision," he handed out six celluloid film strips, one of which portrayed frontal above-the-waist female nudity. After an investigation, on February 18, 1993, Superintendent Roy imposed limited restrictions on Silano's access to school facilities for the balance of the school year and on February 22, 1993, the Board passed a resolution criticizing Silano for his "poor judgment" and "censuring" him.

The genesis of Silano's math class visit was a Board meeting at which math teachers expressed concern about students' difficulty with math. In response, Silano offered to lecture on how film relates to math and arrangements were made for Silano to visit and make presentations to three math classes. Silano decided to bring materials to aid him in his presentations and selelcted 35 mm. film clips from a 30-year old film. These were the only 35mm. film clips he had and he took all of them. Although Silano also had 16mm. film clips, he decided the 35mm. clips were larger and easier to view.

One of the six 35mm. clippings in question depicts men and women from the waist up, unclothed and seated together. The breasts of the woman closest to the camera are clearly visible and prominently in view. The breasts of a second woman farther from the camera are less prominent.

The first of the three classes visited by Silano was a co-educational tenth grade math class. About half way through the lecture, Silano handed the film clips out and they were passed around the room. At the conclusion of the lecture, Principal John Luciano, who had been

present for the guest presentation, advised Silano that the film clip portraying frontal female nudity should not be distributed in the course of Silano's presentations to the remaining two math classes. Silano agreed.

B. The Apology.

On Monday, February 8, 1993, Silano apologized in writing to the entire tenth-grade math class. Silano conceded that the display of nudity may have been inappropriate. He also acknowledged that some students may have considered the film to have been provocative. In its entirety, the letter stated:

> It seems that one of the sample strips of film I used last week in your class was *inappropriate* for the topic under discussion.
>
> Since some of the small group of students who saw this film strip may have thought it *provocative* [sic], please tell them I'm sorry that I used it in trying to make my topic easier to understand.
>
> I enjoyed visiting your class and hope the students gained important knowledge about the way film is used to create the illusion of motion (emphasis added).

C. The Superintendent's Order.

On February 18, 1993 Superintendent Roy barred Silano from visiting the schools during school hours for the balance of the school year. Silano was allowed, however, continued access to the central office in order to carry out his Board of Education duties. He was also allowed to attend sporting events and other school functions.

D. The Resolution of the School Board.

At a meeting of the Board held on February 22, 1993, a resolution criticizing Silano's poor judgment in showing the film clip, directing him to comport himself appropriately in the future, and censuring Silano for his conduct, was unanimously adopted.

E. Silano's Education Law §310 Appeal.

Silano appealed Superintendent Roy's action and the Board's action to the New York State Commissioner of Education pursuant to New York State Education Law §310. The Commissioner's decision, rendered July 22, 1993, sustained the appeal only to the extent of striking the one paragraph of the Board resolution that formally "censured" the petitioner on the technical ground that the "censure" of a fellow board member, like a "reprimand," was beyond the statutory power of a school board. On the other hand, the Commissioner agreed that school board members may criticize each other for poor judgment. Therefore, all other portions of the resolution were upheld. In addition, the Commissioner upheld the limited restrictions imposed by Superintendent Roy on Silano's access to school facilities reasoning that, as a board member, Silano had no special rights of access under State law that supplemented whatever public access was afforded to the community at large.

F. District Court Proceedings.

Prior to receiving the Commissioner's decision, Silano filed an 89 paragraph, 29 page complaint alleging, among other things, that Superintendent Roy's order and the Board of Education's resolution violated his First Amendment right of free speech and his Fourteenth Amendment

due process rights under 42 U.S.C. §1983. It was during this litigation, *and not before,* that Silano first asserted that the controversial film clip demonstrated the equal rights of men and women to appear together barechested.

The District Court granted summary judgment to defendants dismissing the complaint. The Court held that Silano's First Amendment rights were not violated because: (a) a public school classroom is not a public forum for First Amendment purposes, (b) a local School Board has broad discretion in curriculum management and is entitled to control a school's curriculum, and (c) the subject of Silano's lecture had nothing to do with the alleged equality of the sexes. The District Court also dismissed Silano's due process claims holding that Silano was not deprived of a property or liberty interest and that any injury sustained was to his reputation only.

G. Court of Appeals Proceedings.

The Court of Appeals affirmed in all respects in an expanded opinion that accepted the reasoning of the District Court.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

Although framed by petitioner as a case involving issues of First Amendment free speech and Fourteenth Amendment due process, no expressive conduct or activity actually occurred, thereby vitiating any alleged constitutional violations. In addition, the core issues raised by the instant petition have been recently visited and revisited by the Supreme Court in *Jeffries v. Harleston,* 21 F.3d 1238 (2d Cir. 1993), *cert. granted, vacated and remanded,* ___ U.S. ___ (1994) and in *Waters v.*

Churchill, 511 U.S. ___ (1994). The petitioners have also failed to show any of the reasons set forth in Supreme Court Rules 10.1(a), 10.1(b) and 10.1(c) which justify the granting of this petition. Finally, there is no conflict among the Circuits or any other basis for further review by this Court.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

A. "Conflict" Among the Circuits.

Petitioner claims that a conflict exists among the Circuits with respect to classroom speech. To support his contention, petitioner cites *Ward v. Hickey,* 996 F.2d 448 (1st Cir. 1993) as prohibiting punishment for teachers for past conduct not specifically proscribed by the school authorities. However, in discussing the extent of speech protected for teachers in the classroom, the court in *Ward* noted that "we do not hold that schools must expressly prohibit every imaginable inappropriate conduct by teachers." The court went on to say that the "relevant inquiry is: based on existing regulations, policies, discussions, and other forms of communication between school administration and teachers, was it reasonable for the school to expect the teacher to know that her conduct was prohibited?" 996 F.2d at 454.

In this case, Silano, as a Board member, should have known that a film clip depicting above-the-waist female frontal nudity was an inappropriate teaching aid for a co-educational tenth grade math class and, consequently, school authorities were reasonable in their expectations

that such conduct would not be exhibited and reasonable as well in their subsequent reactions. Moreover, Silano *fully admitted* the inappropriateness of his conduct in his letter of apology.

B. The First Amendment Claim Has No Merit.

The Court of Appeals correctly reasoned that: (a) no expressive conduct or activity occurred as there was no classroom discussion or any classroom reference to the subject of gender equality, (b) school officials may limit the content of school sponsored speech so long as such restrictions are based upon a legitimate pedagogical concern, and (c) Silano's activity as a guest lecturer was curricular in nature, and therefore did not require that clearly established rules and procedures be in place in order to regulate the curriculum.

Here, Silano was teaching a mathematics c.ss and was demonstrating the relevance of mathematical principles to film making. He discussed the "persistence of vision," a phenomenon in which the brain converts a series of statis images case in rapid succession upon the retina into a perception of motion. As a visual aid, Silano displayed celluloid strips of film on which the students could see that a "motion picture" is actually made up of individual frames, each one of which is a still picture.

The celluloids were displayed to the class for their physical characteristics – the size of each frame, the number of frames per foot, the static nature of each frame and the sequential variation in the images from frame to frame. Silano was not lecturing about the subject of his film. There was no discussion, prior to class or after class, concerning any of the issues that

might broadly be referred to as "chest equality" which he subsequently claimed constitute the protected expression that allegedly motivated the Superintendent and Board members to take the actions challenged.

Indeed, the First Amendment claim raised herein is entirely pretextual in the sense that the gender equality issues were conjured up by Silano after the fact to retaliate against criticism of his inappropriate conduct, conduct for which he himself apologized in writing. This is vividly demonstrated by the fact that after his initial lecture, Silano gave two other lectures to math classes during which he did not use the controversial celluloid film clip and his speech and interaction with the students was neither inhibited nor restricted. Thus, Silano was not engaged in expressive activity and, accordingly, there could be no First Amendment violation.

Even assuming, *arguendo,* that Silano's activity could be broadly construed as expression, the Court of Appeals correctly applied the standards set forth in *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988) in defining the parameters of limitations placed upon his speech. In *Hazelwood,* the Court held that school authorities may limit school sponsored speech "so long as their actions are reasonably related to pedagogical concerns." 484 U.S. 273.

Here, there was no legitimate pedagogical purpose to circulating a film clip depicting frontal above-the-waist female nudity as there was no pedagogical purpose to the act at all. By Silano's own admission:

- the planned subject of his presentation was relating math to filmmaking through the 'persistence of vision' phenomenon;
- Silano chose six particular film clips as visual aids because they constituted all of the 35mm. film

clips he had in his home, without reference to the subject of the film or the particular scenes portrayed in the clips and he wanted 35mm. film because of the larger frame size and ease of use;

- there was no discussion or even reference to the subject of nudity and women's breasts, gender neutrality or a woman's right to appear bare-breasted under circumstances in which a man appears barechested;
- the students asked no questions about the breast scene film clip; and
- Silano conducted two subsequent presentations without the breast scene film clip which, by his own admission, were just as successful in making the points which he intended to make.

Accordingly, there was no pedagogical purpose to circulating the Birth Scene film clip among the students in their tenth grade math class. Thus, applying the *Hazelwood* standard, the Court of Appeals held that the undisputed facts showed that the actions of the school officials were reasonably related to legitimate pedagogical concerns.

C. The Absence of a School Policy Regulating the Curriculum Does Not Alter the Result.

The Court of Appeals also correctly held that, as a guest lecturer, Silano should be afforded no greater rights than a teacher. Thus, applying the standards of *Hazelwood,* school officials had the discretion to decide the appropriateness of materials used in the classroom. In *Hazelwood,* the Court specifically held, with respect to curriculum, to require prior publication of regulations "could unduly restrain the ability of educators to educate." 484 U.S. at 273, note 6.

Thus, contrary to petitioner's contentions, *Hazelwood* reaffirms the principle that school authorities can regulate speech in the classroom without requiring prior regulations, guidelines or policies.

D. The Due Process Claim Has No Merit.

Superintendent Roy's order and the Board's subsequent censure of Silano did not deprive him of any property or liberty interests protected by the Due Process Clause of the Fourteenth Amendment.

Constitutionally protected liberty or property interests are created and defined by state law. *Paul v. Davis,* 424 U.S. 693, (1976); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). Here, neither the Superintendent's order nor the Board's resolution implicated either a liberty or property interest protected by the Constitution as Silano failed to put forth any evidence showing that the challenged actions impaired any legal right or status other than, perhaps, damage to his reputation. Further, under state law, Silano did not have an unrestricted right to enter school property during school hours. *Matter of Bruno,* 4 N.Y.S. Ed. Dept. Reports 14, 17, 18 (1964), *Matter of Keyser,* 15 N.Y.S. Ed. Dept. Reports, 471, 474 (1976). This rule was reaffirmed in the Commissioner's decision in this very case resolving Petitioner's Education Law §310 appeal.

Petitioner premises his denial of liberty and property interests upon school policy 3210 which encouraged visitors in the schools, providing that visitors signed in in the main office, explained their presence, and obtained permission before visiting any classrooms. As correctly stated by the Court of Appeals, the creation of a constitutionally protected liberty interest requires "the repeated use of explicitly mandatory language in con-

nection with requriing specific substantive predicates." *Pernell v. Lord,* 952 F.2d 679, 684 (2nd Cir. 1992); *Hewitt v. Helms,* 459 U.S. 460, 472 (1983). Thus, the Court of Appeals correctly reasoned that school policy 3210 gave school officials discretion in allowing visitors into the school and did not contain any mandatory language which would vest the public with a protected liberty interest in visiting the schools.

CONCLUSION

Petitioner is entitled to his opinion, expressed during his deposition, that "there is no difference between an earlobe and an elbow or a breast" and the idea that women should be expected to cover their breasts under circumstances in which men are not expected to cover their chests evinces socially archaic notions of behavior and even gender discrimination. Here, however, his distribution to a co-educational mathematics class of a film clip depicting frontal above-the-waist female nudity was entirely gratuitous, serving no pedagogical purpose, not constituting "communicative expression" and for which he apologized in writing.

This is a case about nothing more than petitioner's hurt feelings at being publicly criticized for his admittedly inappropriate classroom conduct and it is a case which trivializes the majestic protection of the First Amendment. The writ of certiorari should be denied.

Respectfully submitted,

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May 26, 1995